86-366

NO.

Supreme Court, U.S.
FILED
AUG 30 1986
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1986

THOMAS NORMAN BROOKS

Petitioner,

versus

UNITED STATES OF AMERICA

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

(1) Did the District Court's limitation of cross-examination by the Petitioner of the Government's key witness, Robert Houston, the Petitioner's purported co-conspirator, in matters which went to his plea agreement, constitute a violation of Petitioner's Sixth Amendment Right of Cross-Examination when said questioning was essential to show the motivation and bias of the incentive witness and to impeach his credibility?

(2) Should the "invited response" rule apply to allow a prosecutor to blatantly state his personal opinion to a jury as to the defendant's credibility when defense counsel's remarks which "invited" the improper comment were made initially in response to improper prosecutorial statements made during the first phase of the Government's closing argument? If so, may the "invited response" rule apply to deprive the Petitioner of his right to a fair trial when the Prosecutor commented on the evidence and the credibility of the Defendant during closing arguments, particularly in view of the nature of the charge, conspiracy, and the role that the credibility of the Petitioner, as opposed to the credibility of the Government's witness, Robert Houston, played in assisting the Jury in reaching a decision?

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

THOMAS NORMAN BROOKS
Petitioner

vs.

UNITED STATES OF AMERICA
Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT

Petitioner respectfully prays that a Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit issue to review that Court's decision in this case rendered on April 2, 1986.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is styled as *United States v. Brooks,* was rendered on April 2, 1986, and is not yet reported.[1] A copy of the opinion of the Fifth Circuit is attached to this

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[1] All of the parties to the proceeding to be reviewed are Boyce Holleman, Michael B. Holleman, and Robert Norman Brooks, for the Petitioner, Thomas Norman Brooks; and George Phillips, United States Attorney, and James Tucker, Assistant United States Attorney, for the Respondent, United States of America.

Petition as Appendix "B". A timely Petition for Rehearing was denied on June 2, 1986. A copy of the Order denying rehearing is attached to this Petition as Appendix "A".

The Order of the District Court Judge sentencing the Petitioner to serve nine (9) years was rendered on August 22, 1985. A copy of the August 22, 1985, Order of United States District Judge is attached to this Petition as Appendix "C". On July 31, 1986, an Order Extending Time to File Petition for Writ of Certiorari was entered by the United States Supreme Court extending the date for filing the presenting Petition up to and including August 31, 1986. A copy of the Order Extending Time to File Petition for Writ of Certiorari is attached to this Petition as Appendix "D".

JURISDICTION

Petitioner brings this his Petition for Writ of Certiorari to review the Order entered by the Fifth Circuit Court of Appeals on April 2, 1986, affirming his conviction. *See,* Appendix "B". In addition to the opinions referred to *infra*, the Petitioner would state that an Order Extending Time to File Petition for Writ of Certiorari has previously been entered by this Court on July 31, 1986. A copy of the Order Extending Time to File Petition for Writ of Certiorari is attached to this Petition as Appendix "D". The Petitioner invokes the jurisdiction of this Court by way of a Petition for Writ of Certiorari through the authority of 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves two (2) constitutional provisions:

(A) The Sixth Amendment to the United States Constitution, particularly as relating to the right of cross-examination:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; *to be confronted with the witnesses against him;* to have compulsory process for obtaining witnesses in his favor and to have the Assistance of Counsel for his defense.

U. S. CONST. amend. VI

(B) The Fifth Amendment to the United States Constitution, particularly as relating to the right of an accused to a fair trial:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, *nor be deprived of life, liberty, or property, without due process of law;* nor shall private property be taken for public use, without just compensation.

U.S. CONST. amend. V

STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

On March 13, 1985, Petitioner, Thomas Norman Brooks, was indicted by a federal grand jury sitting in the Southern District of Mississippi, Jackson Division, as a public official for violation of the Hobbs Act, 18 U.S.C. §1951 and §2. Initially, the indictment charged that the Petitioner "knowingly and willfully did attempt and conspire with persons unknown and known to the Grand Jury to obstruct, delay and effect commerce as that term is defined in §1951, Title 18, U.S.C., and the movement of articles and commodities in commerce, by means of extortion, also defined in [said section]". Subsequent to Defense Counsel's submission of his Motion to Dismiss Indictment or in the Alternative to Require the Government to Make an Election alleging that the indictment was duplicitous in that it charged two (2) offenses in the same count, the Government voluntarily agreed to elect the conspiracy aspect of the indictment.

The Petitioner was tried in the United States District Court for the Southern District of Mississippi, Jackson Division, Honorable Tom S. Lee presiding, on May 28, 1985, through June 4, 1985. The Petitioner was found guilty by a jury on June 4, 1985, in violation of 18 U.S.C. §1951. Judge Tom S. Lee, United States District Judge, deferred sentencing until August 22, 1985, at which time he sentenced the Petitioner to serve nine (9) years, said execution of sentence deferred for ninety (90) days until November 20, 1985, with an additional five (5) day extension granted to November 25, 1985. The Petitioner, Thomas Norman Brooks, has been incarcerated at Maxwell Field in Montgomery, Alabama, since November 25, 1985.

On appeal to the United States Court of Appeals for the Fifth Circuit, the conviction of the Petitioner was affirmed on April 2, 1986, in an opinion to be published, but not yet reported. On June 2, 1986, the Petition for Rehearing was denied in the Fifth Circuit Court of Appeals with the mandate issuing on June 12, 1986. On or about July 30, 1986, the Petitioner timely filed a Motion for Extension of Time in which to file the Petition for Writ of Certiorari, which was granted by this Court on July 31, 1986, extending the date for filing the present Petition for Writ of Certiorari to and including August 31, 1986.

B. SUBSTANTIVE FACTS

The Petitioner, Thomas Norman Brooks, was President Pro Tem of the Mississippi Senate when he was indicted and subsequently convicted for purportedly conspiring with one Robert Houston to extort monies from the Mississippi Horse Racing Association in violation of 18 U.S.C. §1951. In order to assist the Court in understanding the crucial role that Robert Houston's credibility, as pitted against that of the Petitioner, played in the conviction of the Petitioner, and why the errors that occurred deprived the Petitioner of adequately exposing to the Jury Houston's questionable credibility, bias and motivation, a brief summary of the background facts is given.

While in the legislature and serving as a Senator, the Petitioner was contacted by one Robert Houston in reference to legislation which would affect business in which Houston was dealing. Brooks had known of Houston prior to that because he had seen Houston as a young child growing up in Leake County, a small rural community in Mississippi. In approximately 1982, Robert Houston again

approached the Petitioner in reference to another business venture. Although the details of their business relationship are not essential here, suffice it to say that from 1982 to 1985, the Petitioner and Robert Houston engaged jointly in a least five (5) business ventures. In that the Petitioner had been in the State Legislature for close to twenty-nine (29) years, he was able to introduce Robert Houston to business contacts he would not have had otherwise.

During the 1985 session of the Mississippi State Senate, the timespan within which the offense purportedly occurred, 1,081 Senate bills were introduced. In addition to these, 378 House bills were sent over to the Senate for vote. One of the bills sent over from the House to the Senate was House Bill 434, commonly called the "Horse Racing Bill". The circumstances leading to the conviction of the Petitioner revolved around that particular Bill. Additionally, the Mississippi Legislature was in a state of chaos in that teachers throughout the State were on strike and were at the State Capitol at that time attempting to receive pay raises.

The "Horse Racing Bill" had been before the Mississippi Legislature since 1983 and promised to be the source of one of the most heated sessions of the Mississippi State Legislature's history. On one hand, the Racing Bill was being introduced into the very heart of the "Bible Belt" in the deep south. On the other hand, the passage of horse racing promised to be the great financial savior for Mississippi. At this time, Mississippi was in dire financial shape in that one of its counties, Tunica County, had been declared in the 1980 U.S. Census to be the poorest county in the Nation with 52.9 percent of its citizens living below the poverty level; additionally, as stated previously

teachers throughout the State were on strike promising not to work without pay raises.

Such was the environment in which this controversy arose. Prior to the time that House Bill 434 passed in the House, the Petitioner was approached by a Mr. Keith Douglas, Treasurer of the Mississippi Horse Racing Association, in reference to the horse racing bill. Mr. Douglas inquired as to how to have it passed and the Petitioner gave him various suggestions, among which was to contact Robert Houston. Robert Houston had expressed interest in seeing the bill passed and asked the Petitioner who was pushing the bill. The Petitioner introduced Houston to Mr. Douglas at the Capitol and he said nothing further. After Houston's meeting with Mr. Douglas, Houston approached the Petitioner and told him he was interested in buying stock; Brooks told him he was broke. Houston later related to the Petitioner that he had bought some stock for himself and that he (Houston) had been employed by the Mississippi Horse Racing Association as a lobbyist. He related that he was to be paid $20,000.00 for his services as a lobbyist. At this time, the Petitioner was in dire financial straits.

While Robert Houston was achieving supreme financial success [1984 Taxable Income approximately $140,000], the Petitioner's financial situation was quite the opposite. Brooks' financial situation became grave in 1984 when he lost his job of selling drilling mud to an oil company due to the oil boom. At that time the only income the Petitioner's family had was approximately $8,100.00 to $8,200.00 per year plus $44.00 per diem allowance while actually in Jackson, Mississippi, for his job as State Senator. In addition to this, his only other source of income was

approximately $192.00 per month for disability pay he received as a disabled veteran. At this point in 1984 when the Petitioner lost his sales job, he owed the Farmers Home Administration $186,000.00 on a note for his farm, and owed $5,000.00 to $6,000.00 on his home. The Petitioner had also signed a guaranty note in 1982 on a company in Alabama, the Alabama Waterproofing Company, which had since grown insolvent. He was sued in Alabama on this note with a $1,000,000.00 judgment being taken against him. Due to the obvious financial strain the Petitioner was under, he filed for bankruptcy on February 13, 1985.

Due to the Petitioner's and Houston's previous business arrangement in Houston advancing Petitioner $20,000.00 before his employment actually began, Houston related to the Petitioner that as soon as the Horse Racing Association paid him his fee of $20,000.00 for lobbying, he would immediately advance the money to the Petitioner.

Due to the nature of the charge, the investigation of this matter involved what is commonly referred to as "wiring up" individuals and recording various conversations. The government involvement in this case did not begin until February 20, 1985, at which time the FBI was contacted by one James Newman, the President of the Horse Racing Association. Mr. Newman had taken it upon himself to "wire" himself up, unbeknownst to the FBI, and record several conversations with Robert Houston and others, which he had been doing since early February. Hence began the Government's involvement on February 20, 1985; the bill had passed in the House of Representatives on January 20, 1985, had been defeated in the State Senate on February 14, 1985, and was up again for re-vote on February 21, 1985. Robert Houston, the alleged co-

conspirator, was apprehended on February 21, 1985, by the FBI while accepting money from Newman and was promptly taken to his attorneys office where, with the assistance of three (3) attorney's, he signed a Memorandum of Understanding thereby agreeing to cooperate with the Government in "catching" the Petitioner. Houston was then "wired" by the Government at their request and met the Petitioner that night of February 21, 1985, in a bar at a Holiday Inn in Jackson, Mississippi. Under the instruction of the FBI, Robert Houston was specifically to mention "money" in his recorded conversation with the Petitioner that night. He was also instructed to bring up the subject of the Horse Racing Association and votes as much as possible in the taped conversations between Robert Houston and the Petitioner on that date. In exchange for his testimony before the Federal Grand Jury and at trial, and for the successful conviction of the Petitioner, the Government agreed to not recommend more than six (6) months incarceration for Robert Houston.

Since the matter came before the United States Court of Appeals for the Fifth Circuit, Robert Houston has been sentenced. At the sentencing, the Government recommended that Robert Houston serve no time. Consequently, Robert Houston was given community service hours with no jail time. Robert Houston is the epitome of an incentive witness as evidenced by the lack of jail time he received. Additionally, the Petitioner had been told personally by Houston that he had been involved in criminal activities in the past. The evidence offered against the Petitioner by the Government in the conviction below involved, to a great extent, the playing of taped conversations between Robert Houston and individuals from the Mississippi Horse Racing Association. Houston was allowed to go through the

majority of the tapes with the jury and render his interpretation to various words in the conversations, i.e., "information" means money. Additionally, in that it was a conspiracy charge and Robert Houston was the purported "co-conspirator", he was the Government's key witness against the Petitioner. As stated *infra*, Houston had confined in the Petitioner on several occasions that he had been involved in criminal activities in the past. When Petitioner's counsel attempted to question Houston as to criminal matters he had been investigated for, the District Judge precluded him from doing so.

The Petitioner brings his Petition for Writ of Certiorari raising as substantive issues those errors committed at trial which prevented him from effectively exposing Houston's bias and motivation in testifying against the Petitioner and additionally prevented the Petitioner from impeaching his purported "co-conspirator's" credibility. Additionally, the prosecutorial misconduct in commenting on the credibility of the Petitioner deprived the Jury of reaching its own verdict, thereby depriving the Petitioner of his right to a fair trial.

REASONS FOR GRANTING THE WRIT

THE WRIT OF CERTIORARI SHOULD BE GRANTED TO DETERMINE WHETHER THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT HAS MADE A RULING IN CONFLICT WITH ITS PRIOR RULINGS, RULINGS OF OTHER CIRCUIT COURTS OF APPEALS, AND RULINGS OF THE UNITED STATES SUPREME COURT CONCERNING A DEFENDANT'S RIGHT TO CONDUCT

MEANINGFUL CROSS-EXAMINATION OF A CO-CONSPIRATOR, INCENTIVE WITNESS, IN ATTEMPTING TO IMPEACH HIS CREDIBILITY, AND TO SHOW BIAS AND MOTIVATION; ADDITIONALLY, TO DETERMINE WHETHER SUCH CONFLICTING RULING WAS MADE REGARDING CONSTITUTIONAL DEPRIVATION OF THE RIGHT TO A FAIR TRIAL AS A RESULT OF BLATANT PROSECUTORIAL COMMENT ON THE EVIDENCE AND ON THE DEFENDANT'S CREDIBILITY

The Petitioner respectfully asserts that the Writ of Certiorari should be granted in that the District Court, and as affirmed by the United States Court of Appeals for the Fifth Circuit, has erroneously applied the law concerning cross-examination as it relates to this Petitioner. In said misapplication, and as a result of upholding the total denial of cross-examination by Defense Counsel of the incentive witness as to matters which go directly to his credibility, motivation, and bias, both the District Court and the Fifth Circuit have acted contrary to clearly established constitutional law concerning the right of a defendant, particularly in a conspiracy charge, to the confrontation of witnesses, specifically those witnesses who have entered into a plea bargain agreement in exchange for their testimony, and even for a resulting conviction. Additionally, in view of recent case law concerning the cross-examination of prosecution witnesses which has been handed down by the United States Supreme Court since this decision was rendered and affirmed, the Petitioner respectfully asserts that a Writ of Certiorari should be granted.

The Petitioner asserts that the District Court, and

the Appellate Court in affirming, have erred in holding that the following denial of cross-examination of the "co-conspirator", incentive witness, Robert Houston, by defense counsel, on matters which went directly to the Memorandum of Understanding entered into between Houston and the Government, (in which Houston agreed to testify against the Petitioner before the Grand Jury, and the District Court for a conviction) Houston's credibility, and his bias and motivation in testifying against the Petitioner, was not a deprivation of his Sixth Amendment Right to meaningful cross-examination.

DURING CROSS EXAMINATION
BY DEFENSE COUNSEL
OF ROBERT HOUSTON:

Q. Mr. Houston, in looking at the Memorandum of Understanding which has been introduced as G-17 here, I notice that it contains the language here about your cooperation regarding the community and cooperation of any and all illegal activities of which you have knowledge in addition to this incident that's on trial.

A. Yes, sir.

Q. Have you previously been questioned by the FBI on other matters?

MR. TUCKER: To which I object, Your Honor. How is that relevant?

MR. HOLLEMAN: If Your Honor please, I think we filed a motion and asked that the Government tell us if he had been previously questioned or if there had been matters pending by the FBI that I

think we're entitled to know, that's included in this Memorandum of Understanding other than this.

MR. TUCKER: I don't know what he's talking about, Your Honor. I object. It's not relevant to ask him about anything than what's at issue before the Court now.

THE COURT: I'll sustain the objection.

MR. HOLLEMAN: Would Your Honor permit me to make a proffer on that at that proper time?

THE COURT: Yes sir.

Thereafter, at a later stage of the trial, the reserved right of the Defendant to make a proffer was exercised by defense counsel as follows:

THE COURT: Members of the jury, there is a matter that I must take up with the attorneys, and I'm going to have the Marshal accompany you now to the jury room.

[Jury Out]

THE COURT: Mr. Holleman.

MR. HOLLEMAN: If Your Honor please, when the witness Robert Houston was on the stand and dealing with the question of immunity granted him by the Government or the plea bargain agreement or Memorandum of Understanding, whatever name it may be called by, we were attempting to cross-examine the witness Houston, the line of question being specifically "were you questioned by the FBI or the IRS regarding other crimes prior to this incident which is on trial?" At that point the Government objected, and the Court sustained the objection to that line of questioning, and we requested

the right to make a proffer on that point as to what that line of questions was based on, and Your Honor allowed us to reserve that right.

THE COURT: Yes sir.

MR. HOLLEMAN: At this time I ask the Court for the right to make that proffer.

THE COURT: All right, sir. Proceed.

MR. HOLLEMAN: We would show, if your Honor please, that we believe that line of questioning would show that Mr. Houston had indeed been questioned within the last two or three years by the FBI or the IRS and had been a subject of investigation by the FBI, acording to our information, with reference to certain activities--past activities, civil rights activities and so forth--in the Mississippi area and his association with those matters and that those matters included some church burning or whatever involved in civil rights activities, and he had been the subject of FBI investigations and IRS investigation in addition to that. That was our information upon which our cross-examination of the witness Houston was placed, and that the Memorandum of Understanding given him by the Government, entered into by the Government specifically includes all other knowledge of other crimes for which we deem appropriate to have granted to that witness immunity from anything that he may have been under investigation for by the FBI in the past. To that inquiry the Government objected. The Court sustained it, and we now have that proffer in the record as having been the proffer that we intend to show and develop by that cross-examination.

> THE COURT: All right, sir. While the jury is out of the room, does the defendant have anything further?
>
> MR. HOLLEMAN: Yes, I do, if Your Honor please.
>
> THE COURT: Of course, with reference to your proffer, for the purposes of the record, it has been made. The Court did sustain the objection to that line of inquiry.

It can be readily seen that the District Court's action in restricting the cross-examination of the witness, Robert Houston, by the defense counsel, effectively closed the door on issues which would have seriously affected the credibility of the witness, Robert Houston, and it follows that, if his credibility had failed, then the Defendant would have been acquitted.

This becomes more apparent as evidenced by the note prepared by the jury during its deliberations in which the jury requested the following:

> "Judge Lee: Can we have a copy of the transcript of Robert Houston's testimony of Senator Brooks?"

The Petitioner respectfully asserts that this denial of cross-examination of the Prosecutor's key witness deprived the Petitioner of his right to meaningful cross-examination and was directly contrary to the constitutional law among the various Circuits, particularly the Fifth Circuit, and additionally, the United States Supreme Court.

The United States Court of Appeals for the Fifth Circuit affirmed the holding by the District Court sustaining the Government's objection to the cross-examination of

Houston, *infra*, holding that the Petitioner's argument was based upon a misreading of the plea agreement. The Fifth Circuit held that Houston's immunity from prosecution went to illegal acts which he voluntarily disclosed to the prosecution. The Petitioner would assert that from a reading of the "four corners" of the Memorandum of Understanding, Houston was granting immunity for any illegal activities of which he had knowledge. The critical issue is not what the Memorandum of Understanding may arguably state, but what thoughts were going through Robert Houston's mind as an incentive to sign the agreement and testify against the Petitioner?

Robert Houston had previously related to the Petitioner that he had been investigated in the past for criminal activities. The denial of the Petitioner in exposing this fact to the Jury, thus bringing into question his credibility, and to show the Jury all that Robert Houston had to gain by testifying against the Petitioner, is a Sixth Amendment violation. Defense Counsel was cut off at the very beginning of what was the crux of his defense: exposing Robert Houston as an individual who had a great deal to gain and absolutely nothing to lose by testifying against the Petitioner. That there can be no more crucial line of questioning of an incentive witness who is also purportedly a co-conspirator than as to his bias, motivation and credibility is not debatable.

As stated previously, the District Court's holding, and the Fifth Circuit's subsequent affirmance, are in total contravention with Fifth Circuit case law and with cases rendered by the United States Supreme Court. Fifth Circuit cases concerning cross-examination of an incentive witness have consistently upheld the constitutional right

of a defendant to expose a prosecution witness' bias and motivation in testifying and for impeachment. The Fifth Circuit, as with other Courts considering the issue, has held that this right of meaningful cross-examination is particularly crucial when the witness is the key witness for the prosecution, and when the witness purportedly participated in the crime. As the United States Court of Appeals for the Fifth Circuit held in *United States v. Brown*, 546 F.2d 166 (5th Cir. 1977):

> When the witness being subjected to cross-examination is the "star-witness", or was an accomplice or participant in the crime for which the defendant is being prosecuted, the importance of cross-examination is necessarily magnified.
>
> 546 F.2d at p. 170

In the Petitioner's case, the witness Houston was both the "star-witness" and was purportedly the co-conspirator. Additionally, as the Fifth Circuit pointed out in the *Brown* case, the issue of the limitation of cross-examination becomes even more important when that particular witness being prosecuted either "makes" or "breaks" the Government's case. There could not have been any more of a protype of that witness than Robert Houston: he interpreted all of the taped conversations implicating the Petitioner, even to the point of going beyond the ordinary meaning of words, such as testifying that "information" meant money. The Petitioner aserts that inasmuch as the Fifth Circuit's affirmance of the District Court's holding is inapposite with its prior ruling in *United States v. Brown, infra*, that the Writ of Certiorari should be granted. Not only is the Fifth Circuit's holding

in the Petitioner's case in direct conflict with *Brown*, it is in direct conflict with well-established law in the Fifth Circuit. As stated by the United States Court of Appeals for the Fifth Circuit in *United States v. Decker*, 543 F.2d 1102 (5th Cir. 1976), in affirming those considerations established in *Davis v. Alaska*, 415 U.S. 308, 39 L.Ed. 2d 347, 94 S.Ct. 1105 (1974), the issues of possible bias and the importance of the particular witness to the State's case should weigh heavily when considering curtailment of cross-examination. Finally, as to the Fifth Circuit's holding on this issue in the Petitioner's case and the resulting contradiction with previous Fifth Circuit law, the Petitioner would cite *United States v. Crumley*, 565 F.2d 945 (5th Cir. 1978):

> Because the district court did not allow the defense sufficient inquiry into Haynes' *motivation in testifying for the prosecution*, we find the *full exercise* of the accused's Sixth Amendment right to confrontation was *frustrated* and the trial judge abused his discretion.

565 F.2d at p. 950 (emphasis added)

In addition to the Petitioner asserting that the Writ of Certiorari should be granted in that the District Court's holding, and the Fifth Circuit's affirmance thereof, are in conflict with established law in the Fifth Circuit involving this issue, the Petitioner asserts that the holdings of the District Court and the Fifth Circuit are in total contravention with rulings of the United States Supreme Court. The Petitioner cites two (2) Supreme Court holdings on this issue. The finding of the District Court and the holding of the Fifth Circuit cannot be resolved with the following

statement in *Davis v. Alaska*, 415 U.S. 308, 39 L.Ed. 2d 347, 94 S.Ct. 1105 (1974):

> A more particular attack on the witness' credibility is effected by means of cross-examination *directed toward revealing possible biases, prejudices,* or *ulterior motives* of the witness as they may relate directly to issues or personalities in the case at hand. The *partiality of a witness is subject to exploration* at trial, and is *'always relevant* as discrediting the witness and affecting the weight of his testimony.'...*the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination.*

39 L.Ed. 2d at p. 354 (emphasis added)

In the Petitioner's trial, Defense Counsel was not allowed to pursue such crucial line of inquiry which directly conflicts with the holding of *Davis v. Alaska, infra.*

Finally, concerning the assertion that the Writ of Certiorari should be granted in that the District Court's ruling, and Fifth Circuit's affirmance, concerning limitation of cross-examination conflicts with case law as established by the United States Supreme Court, the Petitioner would cite *Delaware v. Van Arsdall*, 39 Criminal Law Reporter 3007. *Van Arsdall* had not been rendered when the District Court and the Fifth Circuit acted on the Petitioner's case. Briefly, the facts of the *Van Arsdall* case are as follows. The Defendant, Robert Van Arsdall, was convicted in a Delaware lower court. One Robert Fleetwood testified placing the Defendant Van Arsdall at the scene of the murder: Fleetwood was only one of sixteen prosecution witnesses to testify against Van Arsdall. During the cross-examination of Fleetwood, the following occurred:

> During Fleetwood's cross-examination, defense counsel sought to impeach Fleetwood by questioning him about the dismissal of a criminal charge against him - being drunk on a highway - after he had agreed to speak with the prosecutor about Epp's murder.

39 Criminal Law Reporter at page 3008.

The lower Delaware trial court prohibited the Defense Counsel from pursuing this line of cross-examination any further and the Defendant Van Arsdall was subsequently convicted of murder. The Delaware Supreme Court then reversed the conviction of Van Arsdall holding that such restriction on cross-examination designed to show bias of the prosecution's witness violated the Defendant's confrontation rights under the Sixth and Fourteenth Amendments, and that such violation required reversal. In addressing this issue, the United States Supreme Court handed down several guidelines which should be followed concerning the curtailment of cross-examination by Defense Counsel of a Government witness. The United States Supreme Court pointed out as a preliminary matter that:

> By barring *any* cross-examination of Fleetwood about the dismissal of the public drunkeness charge, the ruling kept from the jury facts concerning bias that were central to assessing Fleetwood's reliability.

Id.

In the appeal of this matter to the Supreme Court of the United States, the State of Delaware contended that the Defendant should have to show "outcome determinative" prejudice to assert a violation of the confrontation clause. The United States Supreme Court went on to state:

> ....the focus of the prejudice inquiry in determining whether the confrontation right has been violated *must be on the particular witness, not on the outcome of the entire trial.*

39 Criminal Law Reporter at 3009.

The high court goes on to state the test as follows:

> We think that a criminal defendant states a violation of the confrontation clause by showing that he was *prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness,* and thereby *to expose to the jury the facts from which jurors...could appropriately draw inferences relating to the reliability of the witness.*
>
> *Id.* (emphasis added)

The Supreme Court went on to vacate and remand because as it stated:

> *A reasonable jury might have received a significantly different impression of Fleetwood's credibility had respondent's counsel been permitted to pursue his proposed line of cross-examination.*
>
> *Id.* (emphasis added)

From a reading of the Opinion of the Fifth Circuit Court of Appeals, these factors were not taken into consideration in affirming the holding of the District Court. Clearly, with the irreplaceable role Houston

played in convicting the Petitioner, had they been taken into consideration, the conviction below would have not been affirmed due to the curtailment of cross-examination. Additionally, a Writ of Certiorari should be granted in that the Fifth Circuit acted in conflict with the Supreme Court in failing to determine if such restriction was harmless error *beyond a reasonable doubt.* This depends on such factors as enumerated above.

In conclusion, as it relates to the holding of the District Court and the United States Court of Appeals for the Fifth Circuit, Petitioner's assertion of the denial of his Sixth Amendment right as a result of the curtailment of the cross-examination of Houston, the Petitioner asserts that certiorari should be granted to correct the holding of the Fifth Circuit Court of Appeals to bring its holding in line with *Davis v. Alaska, infra, Delaware v. Van Arsdall, infra,* and previous decisions of the Fifth Circuit.

The Petitioner asserts that a Writ of Certiorari should be granted in that the Circuit Court of Appeals, in affirming the decision of the District Court, has improperly applied the "invited response" rule which this Court has recognized in its recent decision of *United States v. Young,* 470 U.S. ____, 84 L.Ed. 2d 1, 106 S.Ct. ____ (1985). The Petitioner would understand *Young* as standing for the proposition that the proper inquiry is not the "prosecutor's license to make otherwise improper arguments, but whether the prosecutor's 'invited response', taken in context, unfairly prejudiced the defendant." 84 L.Ed. 2d at page 10. A Writ of Certiorari should be granted in that the Fifth Circuit has misapplied that rule. In affirming the holding of the District Court below, the Fifth Circuit Court of Appeals held that the following statement by the Pro-

secutor, in the final phase of the Government's closing argument, was an "invited response" and further, did not constitute plain error:

> Mr. Holleman says and rightfully so he represents Mr. Brooks, Senator Brooks, whatever, he says that Senator Brooks told and I am going to give you an example. He said Senator Brooks got on the witness stand and told it like it was. Now, do you believe that? Do you honestly believe that just because Mr. Holleman says that that its the truth? Think about it a minute. Please do not forget that Mr. Holleman's very eloquent speech here today is not what you heard on that witness stand yesterday afternoon. Now I don't know what. I would not presume for one moment to make decisions for any one of you, six will get you a half dozen, that most of you on the jury felt the same way I did. *I was embarrassed, I was absolutely embarrassed by Senator Brooks' explanation as to events. At one point I even covered my face I was so embarrassed for the man. I do not believe that any of you believe that he was credible.* (emphasis added)

The Petitioner would state that the "invited response" rule of *Young* was improperly invoked in this instance in that the remarks by the Prosecutor in the final phase of closing arguments were not made so as to "right the scale", but were made so that the scale could be tipped, once again, in favor of the Government, and its witnesses. In a conspiracy trial, wherein Defense Counsel was absolutely prohibited from questioning the incentive witness, who was also the "co-conspirator" and in which the Jury had a difficult time in weighing the credibility of the "co-conspirator" and

the Petitioner, as evidenced by a request during deliberations for a transcript of the testimony of these two (2) witnesses, the Prosecutor's blatant comments on the credibility, or lack thereof, could only deprive the Petitioner of his right to a fair trial in that the Prosecutor was allowed to sit as a "thirteenth juror." *United States v. Garza*, 608 F.2d 659 (5th Cir. 1979). In holding that the "invited response" rule allowed the Prosecutor to make the aforestated comments, the Fifth Circuit held that those comments were initiated by Defense Counsel's vouching for the Petitioner's credibility. The Writ should be granted because as required by *Young* and the Fifth Circuit case law, the improper comments should be reviewed in the context in which they occurred. May the "invited response" rule allow Prosecutors to make such improper comments, usurping the Jury's role, and later state they were made in response to defense counsel's comments, when in fact defense counsel was provoked and had a duty to his client to make such comments after the Government in the *first* phase of closing arguments commented on the defendant's testimony?

The Writ of Certiorari should be granted because the defense counsel's statements were made to "right the scale" in that were made in response to such statements in the initial phase of closing argument by the Government as follows:

> *Concerning the testimony of the Petitioner:* Just ask yourself what's reasonable. Isn't it just too convenient what Senator Brooks is now trying to put forward to you? Isn't it just a little too convenient? Doesn't it all just kind of - have plugged in here and there conveniently? A little too conveniently, I suggest *to believe*

what he's putting forward at this time is to believe that about 90 percent of the Government's case is false. I suggest to you that isn't reasonable. (emphasis added)

Concerning the testimony of Government witness, James Newman, the President of the organization from which the Petitioner purportedly extorted money: He did what was right. That's what he did.

He did what was right, ladies and gentlemen. That's what he did. He did what was right.

He did what was right. He came up here. He told you.

These are some of the remarks made by the United States Attorney George Phillips in the *initial* phase of closing arguments by the Government. The arguments of Mr. Phillips were resplendent with his personal opinion of the credibility of the Appellant's testimony as "convenient". By the Fifth Circuit's ruling on this issue, and in failing to view the entire context in which such statements were made, in applying the "invited response" rule, it tells the Petitioner's counsel that he should have sat idly by and not attempted to rebut those prejudicial arguments by Mr. Phillips. The Petitioner asserts that the Fifth Circuit incorrectly applied the "invited response" rule in that this was not a situation where defense counsel unprovokedly made improper comments to which the prosecutor then responded, as in *Young.* Such circumstances were not those contemplated by *Young.* There was repeated provocation of Defense Counsel in this presenting case: there was none in *Young.* Defense Counsel in his remarks attempted to "right the scale." 84 L.Ed. 2d at page 11. The Petitioner

respectfully asserts that a Writ of Certiorari should be granted in that the prejudicial remarks made by Mr. Tucker did not fall within the "invited response" rule due to the provocation of Defense Counsel by Mr. Phillips. In applying the "invited response" rule to the presenting facts, the Government would be able to set a trap for Defense Counsel. Such is clearly not the intent of *Young*. Additionally, a Writ of Certiorari should be granted in that the Fifth Circuit has erred in holding Mr. Tucker's remarks were not so prejudicial as to undermine the fairness of the trial, which is the main determinant under *Young*. As a result of the misconduct by the Prosecutor, the Petitioner was deprived of a fair trial for two (2) reasons: (1) considering the nature of the charge, conspiracy, the Petitioner's credibility was the most crucial element in the trial, and (2) considering the nature of the other errors committed in the trial, such as the restriction of the cross-examination of Houston, the cumulative effect was to deprive the Petitioner of a fair trial.

Not only should the Writ of Certiorari be granted in that the Fifth Circuit, in affirming the holding of the District Court, has decided an important constitutional issue contrary to case law of the United States Supreme Court, it has additionally acted contrary to its prior rulings and cases from other Circuits. It is uncontroverted among prior Fifth Circuit case law, and other circuits, that it is improper for an attorney to express his or her personal beliefs concerning the credibility of a witness. [*United States v. Grapp,* 653 F.2d 189, 195 (5th Cir. 1981); *United States v. Morris,* 568 F.2d 396, 401 (5th Cir. 1978); *United States v. Herrera,* 531 F.2d 788, 790 (5th Cir. 1976); *United States v. Garza,* 608 F.2d 659, 663 (5th Cir. 1979); *United States v. Segal,* 649 F.2d. 599, 604 (8th Cir. 1981); *United States v. Latimer,* 511 F.2d 498, 503 (10th Cir. 1975). In its holding

in the presenting case, the Fifth Circuit Court of Appeals acted contrary to its previous holding in *United States v. Grapp, infra,* which enumerated the following two (2) factors to be considered when the Court weighs the prejudice caused by such improper remarks: (1) "the totality of the closing argument" and (2) "the context in which the challenged statements were made." 653 F. 2d at page 195. The Petitioner's credibility was the *most crucial* element in the whole trial. In that the charge involved an alleged conspiracy, and the co-conspirator turned Government's witness, Robert Houston was the *only* witness tying the Petitioner to the alleged conspiracy. Inasmuch as the Fifth Circuit acted contrary to its case law, and holdings of other Circuits on this issue, and has additionally misapplied *United States v. Young,* the Writ of Certiorari should be granted.

CONCLUSION

For the above reasons, Petitioner prays that a Writ of Certiorari issue to the United States Court of Appeals for the Fifth Circuit and that this Court reverse the conviction in this case.

Respectfully submitted, this the 29th day of August, 1986.

THOMAS NORMAN BROOKS, PETITIONER

BY AND THROUGH HIS ATTORNEYS
OF RECORD, BOYCE HOLLEMAN,
A PROFESSIONAL ASSOCIATION

By: _____
BOYCE HOLLEMAN

CERTIFICATE OF SERVICE

I, Boyce Holleman, counsel for Thomas Norman Brooks, Petitioner, do hereby certify that I have this day mailed, United States Mail, postage prepaid, a true and correct copy of the above and foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit to Honorable Charles Fried, Solicitor General, Department of Justice, Washington, D.C. 20543.

This, the 29 th day of August, 1986.

BOYCE HOLLEMAN

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 85-4552

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

THOMAS NORMAN BROOKS,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Mississippi

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(April 2, 1986)

Before GEE, GARZA, and HIGGINBOTHAM, Circuit Judges.

HIGGINBOTHAM, Circuit Judge:

Thomas Norman Brooks was convicted of conspiracy to violate 18 U.S.C. §1951(a) (interference with commerce by threats or violence) by a jury in the district court for the Southern District of Mississippi, and was sentenced to nine years in the federal penitentiary. At the time of the alleged

conspiracy, Brooks was President Pro Tem of the Mississippi Senate. On appeal, Brooks complains that the trial judge improperly restricted the scope of his cross- examination of the key prosecution witness; that the prosecutor impermissibly questioned Brooks about his silence and commented on Brooks' credibility; and that the court wrongly denied a jury request in the absence of the defense. After considering each of the points raised by Brooks, we affirm.

I

A verdict will be sustained if there is "substantial evidence, taking the view most favorable to the Government, to support it." *Glasser v. United States,* 315 U.S. 60, 80 (1942). We present the facts in accordance with that standard.

Brooks had been serving in the Mississippi Legislature for nearly thirty years when the Mississippi Horse Racing Association, through its president, James Newman, and its treasurer, Keith Douglas, asked his advice regarding a bill to legalize pari-mutuel betting in Mississippi. Brooks told them that it would be more difficult to obtain approval from the House of Representatives than from the Senate, and that the MHRA should start with the House. After H.B. 434 passed the House, the MHRA returned to Brooks for counsel regarding Senate passage. Brooks introduced Newman and Douglas to Robert Houston, a close friend who knew many senators, with the advice that they follow Houston's lead.

In a separate meeting, Houston told Douglas that three $1000.00 MHRA membership certificates and $16,000.00 in cash should get the bill through the Senate.

Douglas disclaimed authority to commit the MHRA to payment and took the proposal to Newman. Sometime thereafter, the directors of the MHRA proposed to substitute an additional sixteen $1000.00 certificates for the cash and to issue the certificates to Houston as payment for work as a "lobbyist." Newman met briefly with Brooks to make sure that the payment would secure passage of the bill and later delivered the certificates in blank to Houston. Unknown to Houston, Newman was taping their meetings.

On February 14, 1985, the bill failed in the Senate. Houston told irate MHRA representatives that a couple of senators had double-crossed them and said it was going to take cash to get the job done. Houston discussed with Brooks the payments necessary for reconsideration of the bill, and then phoned Newman, saying it would take $20,000.00 up front and an additional $30,000.00 when the bill passed the Senate to get the bill through the governor's office.

Newman sought the aid of the FBI and was told to meet with Brooks, record the conversation, and determine whether this was an attempted extortion. Newman did so, and according to the transcript of the conversation that was admitted into evidence, told Brooks that he had a present for Houston. Newman testified that Brooks told him not to speak too loud and then called Houston to tell him that Newman had a package for him.

Newman met with Houston and told him that an associate had the money and that Houston could get it later that evening. After instruction from the FBI to make certain of Brooks' involvement, Newman met him in

a car, again wearing a body recorder. Brooks stated that he would be able to win in the Senate with the "information" that he had. Newman testified that by "information", Brooks meant "money."

Arrangements were made for Houston to pick up the money from Newman at 5:00 a.m. the following day, February 21, 1985. When Newman gave the money to Houston the next morning, FBI agents approached them. Houston was not arrested, but was advised to see his lawyer and then to contact the U.S. Attorney's office.

After discussions with his lawyers and the prosecutor, Houston and his attorneys signed a Memorandum of Understanding. The agreement specified that in exchange for Houston's full cooperation, the government would seek only a six-month sentence on a single count in this case, and would not prosecute him for any other illegal activities covered by the agreement. After signing the agreement, Houston was wired and told to meet Brooks, talk about money, and give him a plain paper sack containing $15,000.

Houston met Brooks later that same day in a local hotel bar. There was some talk of money, but its meaning was hotly disputed at trial: the government argued that the talk covered an illegal payment by the MHRA, while Brooks asserted that they were discussing a loan he previously arranged with Houston. After finishing their drinks, they went to Houston's car where Brooks received the money, and Houston drove away. As Brooks crossed the parking lot, the FBI met him and asked what was in the sack. After Brooks denied knowledge of the sack's contents or even where it came from, the agents gave Brooks the prosecutor's telephone number and suggested that he con-

tact him. Brooks then gave the money to the agents and was allowed to leave. Brooks never explained the source of the money or told the FBI that it was simply a loan from Houston. At no time was he taken into custody or placed under arrest.

The FBI hoped that Brooks might join its efforts, as had Houston, to catch other senators who might be involved, but Brooks did not respond to this invitation and was arrested at his office one week later. The resulting indictment charged Brooks with conspiracy and attempt to interfere with commerce by extortion in violation of 18 U.S.C. § 1951; the attempt charge was later dropped, and Brooks was tried only on the conspiracy charge.

II

Brooks complains that his cross-examination of Houston was improperly curtailed when he was not permitted to ask Houston about all offenses possibly included in his plea agreement. Brooks further complains that the government did not disclose the full reach of the agreement and that the agreement itself was not timely given to him.

At trial, Brooks' counsel interrogated Houston as follows:

> Mr. Holleman [Brooks' counsel]: Mr. Houston, in looking at the Memorandum of Understanding, . . . I notice that it contains the language here about your cooperation--regarding the community and cooperation of any and all other illegal activities of which you have knowledge, in addition to this incident that's on trial.

Houston: Yes, sir.

Mr. Holleman: Have you previously been questioned by the FBI on other matters?

Mr. Tucker [prosecutor]: To which I object, Your Honor. How is that relevant?

Mr. Holleman: If Your Honor please, I think we filed a motion and asked that the Government tell us if he had been previously questioned or if there had been a matter pending by the FBI that I think we're entitled to know, [w]hat's included in this Memorandum of Understanding other than this.

Mr. Tucker: I don't know what he's talking about, Your Honor. I object. It's not relevant to ask him about anything other than what's at issue before the court now.

The Court: I'll sustain the objection.

Mr. Holleman: Would Your Honor permit me to make a proffer on that at the proper time?

The Court: Yes, sir.

Brooks' counsel then moved to another area of examination without attempting to elicit information about Houston's cooperation with the FBI concerning other crimes. Immediately before the government rested its case in chief, Brooks made his proffer. He stated that he had not been allowed to pursue his line of questioning to determine whether Houston had been "questioned by the FBI or the IRS regarding other crimes prior to this incident which is on trial." Counsel explained that this was relevant because the plea agreement between Houston and the government "specifically includes all other knowledge of other crimes for which we deem appropriate to have granted to that

witness immunity from anything that he may have been under investigation for by the FBI in the past. To that inquiry the government objected . . . and we now have that proffer in the record. . . ."

Brooks' argument that he was denied a fair opportunity to cross-examine Houston is premised upon a basic misreading of the plea agreement. Houston did not receive immunity for any crimes about which he had knowledge or even those that the government may have investigated. Rather, the plea agreement granted immunity from prosecution for illegal acts regarding which "Houston voluntarily and completely discloses all information and knowledge that he has. Should he not voluntarily and completely disclose, then as to that matter, the government is free to seek prosecution of him." Brooks' able counsel conducted a detailed and thorough cross-examination. That he did not ask Houston what he had told the government about other criminal acts was hardly an oversight, and the court certainly did not foreclose his opportunity to do so. Counsel wanted to put before the predominantly black jury evidence that the FBI had questioned Houston about the burning of a black church near his home. The district court correctly sustained the objection to questions about any such FBI investigation. In the absence of proof that Houston fully cooperated with the FBI's investigation of the burning, such investigation was outside the scope of the plea agreement.

We find no merit in the argument that the government did not timely disclose to Brooks its full agreement with Houston. While the government did not comply with Brooks' discovery requests until ordered to do so by the court, Brooks received the

Memorandum of Understanding well before the trial began. Relatedly, Brooks argues that the government violated the rule of *Brady v. Maryland*, 373 U.S. 83, 87 (1963), apparently by not disclosing the full extent of the agreement's coverage. The record contains no evidence, however, that Houston received any immunity that was not disclosed. We conclude on this record that before the trial the government submitted to Brooks its full agreement with Houston and that Brooks had ample time to consider it in preparing his defense.

III

During the prosecution's rebuttal argument, the pros-
ecutor told the jury that he was embarrassed when Brooks testified and that he did not believe Brooks was credible. Brooks argues that the argument was improper and prejudicial. No objection was made at the time of the argument, however, and thus we test the statement under the plain error standard. When applying the plain error rule, a reviewing court can properly evaluate a case only if it views the claim of prejudice against the entire record. *United States v. Young*, 105 S.Ct. 1038, 1047 (1985). We do so here.

In his closing argument, Brooks' counsel not only attacked the credibility of the prosecution witnesses, but he said that Brooks told the truth while he was on the stand, impermissibly vouching for the credibility of his client. In rebuttal, the prosecutor told the jury that he did not want to tell them what they should think, but as for himself he was embarrassed by the story told by Brooks. The Supreme Court has held that "if the prosecutor's remarks were 'invited' and did no more than respond substantially

in order to 'right the scale,' such comments would not warrant reversing a conviction." *Id.* at 1045. Viewed in the context of comments made by defense counsel, the prosecutor's initial response, though improper, was not so prejudicial as to undermine the fundamental fairness of the trial. Brooks has not demonstrated any plain error regarding reversal.

IV

Brooks argues that the trial court erred in not granting him a mistrial after the prosecutor questioned him about his silence during his first encounter with the FBI and his later silence before trial. Brooks here argues that the FBI took him into custody in the parking lot, that he had not been given the *Miranda* warnings, and that the fact of his silence was therefore inadmissible against him. Alternatively, Brooks argues that even if he were not in custody, this line of questioning was more prejudicial than probative and should therefore have been excluded.

When Brooks was stopped by the FBI, he offered no explanation for the large sum of money he carried in a paper sack, a rather curious circumstance. His silence continued until trial. The prosecutor asked Brooks' about that silence during cross-examination, but Brooks' objection stopped the questioning when it reached Brooks' silence between the time he left the FBI agents and the trial, and the jury was instructed not to consider Brooks' intervening silence in its deliberations.

Brooks was indisputably not in custody when the FBI first stopped him. He was not placed under arrest, he was free to leave, and he did not have to engage in conver-

sation with the officers. The argument that taking his sack of money evidenced custody is refuted by Brooks' own testimony that he offered the sack to the FBI as soon as they identified themselves.

Brooks' relies heavily on *United States v. Henderson*, 565 F.2d 900 (5th Cir. 1978), for the proposition that even if he were not in custody, the use of his silence as evidence is impermissible because its prejudicial effect outweighs its probative value. The passage cited by Brooks, however, states that the "silence of an accused who has not been given a *Miranda* warning cannot be used against him to impeach his credibility, *unless his silence is inconsistent with his innocence and inconsistent with his exculpatory statement given at trial.*" *Id.* at 905 (emphasis added). Here, Brooks took the stand in his own behalf and testified that the money represented a loan he had previously arranged with Houston. His silence regarding the loan, and his denial, when stopped, that he knew that money was in the bag, are inconsistent with his testimony and innocence. The cross-examination was proper and the trial court did not err in granting a mistrial. *cf. Harris v. New York*, 401 U.S. 222, 225-26 (1971) (statements obtained in violation of *Miranda* admissible for impeachment purposes).

V

Finally, Brooks complains that the trial court erred in answering a question from the jury when Brooks and his counsel were absent. He further urges that the jury's request to see a transcript of both Brooks' and Houston's testimony was improperly denied.

After being instructed by the judge, the jury retired to deliberate at about 4:00 p.m. At about 7:00 p.m. it sent a note to the judge requesting copies of Brooks' and Houston's testimony. The judge, without consulting counsel, replied that such copies were not available and that the jury would have to rely on its own recollection of the testimony presented to them during the trial.

We agree that the judge ought to have conferred with counsel before answering the request for the transcripts, but the error was harmless. In *United States v. Breedlove,* 576 F.2d 57, 60 (5th Cir. 1978), we held that if the judge is distinctly responsive to the jury's inquiry, the response clearly states the law, and the defendant does not show any prejudice, then the error in responding to the jury in the absence of the defendant does not require reversal. Here the judge's answer was responsive to the request.

Brooks concedes that the abuse of discretion standard governs the question of whether the trial court erred in not allowing the jury to examine the transcripts of Brooks and Houston's testimony. At the time of the request no transcripts were yet prepared; oral argument indicated it would take at least two days to prepare them. Both Brooks and Houston had recently been on the witness stand, and the trade-off between waiting for the transcripts and the jury's fading recollection of the witnesses with the passing of time may well have persuaded the trial judge to deny the request. Under these circumstances, the trial judge did not abuse his discretion in not halting the jury's deliberations to await transcripts of testimony.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 85-4552

FILED
JUNE 2,1986

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

THOMAS NORMAN BROOKS,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Mississippi

ON PETITION FOR REHEARING

(June 2, 1986)

Before GEE, GARZA, and HIGGINBOTHAM, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby **denied.**

Entered For
The Court

CLERK'S NOTE:
SEE RULE 41 FRAP AND
LOCAL RULE 17 FOR STAY
OF THE MANDATE
/s/ Higginbotham
United States Circuit Judge

APPENDIX C

United States District Court for

United States of America vs.

Defendant} **THOMAS NORMAN BROOKS**

Southern District of Missisippi

Docket No. J85-00009 (L)

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government
the defendant appeared in person on this date--8/22/85

COUNSEL ☐WITHOUT COUNSEL However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.
☒WITH COUNSEL **Boyce Holleman**

PLEA ☐GUILTY, and the court being satisfied that
there is a factual basis for the plea,
☐NOLO CONTENDERE,
☐NOT GUILTY

☐NOT GUILTY, Defendant is discharged

FINDING & JUDGMENT There being a finding/verdict of ☒GUILTY.
Defendant has been convicted as charged of the offense(s) of **Violating Section 1951, Title 18, United States Code: extortion as charged in the indictment.**

SENTENCE OR PROBATION ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of **NINE (9) YEARS.**

IT IS FURTHER ADJUDGED that execution of the sentence herein be deferred until November 20, 1985, at 9:00 a.m., at which time the defendant is ordered to surrender himself to the institution designated by the Attorney General to begin service of this sentence.

SPECIAL CONDITIONS OF PROBATION

ADDITIONAL CONDITIONS OF PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may charge the condition of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by

law, may issue a warrant and revoke probation for a violation occurring during the probation period.

The Court orders commitment to the custody of the Attorney General and recommends,

COMMITMENT RECOMMENDATION

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

CERTIFIED AS A TRUE COPY ON
This Date: 8/23/85

SIGNED BY

☒ U.S. District Judge
☐ U.S. Magistrate **TOM S. LEE**
Date 8/23/85

APPENDIX D

Supreme Court of the United States

No. A-68

THOMAS NORMAN BROOKS,

Applicant

v.

UNITED STATES

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including *August 31, 1986.*

/s/ Byron R. White

Associate Justice of the Supreme Court of the United States

Dated this *31st day of July, 1986.*